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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Dkt. No. 99-200
Number Resource Optimization	)	
	)	

Joint Comments of Midvale Telephone Exchange, Inc., Northeast Louisiana Telephone Company, Inc., Interstate Telecommunications Cooperative, Inc. and Radio Paging Service

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May 19, 2000

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Summary

Midvale Telephone Exchange, Inc., Northeast Louisiana Telephone Company, Inc., Interstate Telecommunications Cooperative, Inc., and Radio Paging Service (the "Joint Commenters") address the Further Notice of Proposed Rulemaking's ("FNPRM's") request for comment regarding the manner in which a "market-based" system of allocating numbering resources might be implemented, and how such a mechanism might improve efficiency.

The Joint Commenters strongly believe that the FNPRM's request for further comments on implementing a "pricing" mechanism for number resources is inappropriate, given the range of key issues that have not yet been addressed. The Commission has not addressed the fundamental question of whether it has enjoys the statutory authority to implement a pricing mechanism at all. The Commission has not properly examined whether such a pricing mechanism is necessary for the efficient distribution of numbering resources. The Commission also has not addressed the full range of concerns in the record that a pricing mechanism would have a negative impact on competition. Moreover, the Commission has not justified the departure that such a mechanism represents from the Commission's existing numbering policies.

It would be inappropriate as a matter of administrative procedure for the Commission to continue to leave these issues unaddressed and unresolved, and the Joint Commenters strongly encourage the Commission to reconsider its conclusions favoring a pricing mechanism for number resources in light of these issues.

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Midvale Telephone Exchange, Inc., Northeast Louisiana Telephone Company, Inc., Interstate Telecommunications Cooperative, Inc., and Radio Paging Service (the "Joint Commenters"), by their attorneys, hereby submit their comments in response to the Commission's Report and Order and Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding.[1]

Specifically, the Joint Commenters address the FNPRM's request for comment regarding the manner in which a "market-based" system of allocating numbering resources might be implemented, and how such a mechanism might improve efficiency. The Joint Commenters strongly believe that requesting further comments on implementing a "pricing" mechanism for number resources is inappropriate, given the range of key issues that have not yet been addressed by the Commission. First, the Commission has not addressed the fundamental question of whether it has the statutory authority to implement a pricing mechanism at all. Second, the Commission has not properly examined whether

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[1] See In the Matter of Number Resource Optimization et al., Notice of Proposed Rulemaking, CC Dkt. No. 99-200, RM No. 9258, NSD File Nos. L-99-17 and 99-36 (rel. June 2, 1999)("Public Notice").

such a pricing mechanism is necessary for the efficient distribution of numbering resources. Third, the Commission has not addressed the full range of concerns in the record that a pricing mechanism would have a negative impact on competition. Fourth, the Commission has not justified the departure that such a mechanism represents from the Commission's existing numbering policies. It would be inappropriate as a matter of administrative procedure for the Commission to continue to leave these issues unaddressed and unresolved. Therefore, the Joint Commenters strongly encourage the Commission to halt its rush toward implementation and reconsider its conclusions favoring a pricing mechanism for number resources.

I. The Commission Must Seriously Address Questions Regarding the Legal Basis for its Pricing Proposals

The Joint Commenters agree with AT&T, AirTouch Communications, Inc. ("AirTouch") and MCI WorldCom that the Commission has very uncertain legal authority to adopt a pricing mechanism.[2] The Joint Commenters agree that since such authority is not explicitly delegated to the Commission in the Communications Act, it cannot be inferred as part of the Commission's administrative powers over numbering.

Unlike Section 309(j), which directly authorized the Commission to use competitive bidding as a means of distributing scarce electromagnetic spectrum, Congress has not granted the Commission any specific authority to assess charges or fees for numbers, much less allocate them to carriers based on a pricing mechanism. [3]

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[2] See AT&T Comments at 61-62; AirTouch Comments at 24-25; MCI WorldCom Comments at 48-49.

[3] Accord, AT&T Comments at 61-62 (citing 407 U.S.C. Section 309(j)(1) and (j)(10).

As AT&T correctly indicates, while Section 251(e)(1) grants the Commission the authority to administer numbering resources, nothing in the Communications Act grants the Commission authority to sell numbering resources as if they were analogous to electromagnetic spectrum.[4] Likewise, this power cannot be inferred from the fact that the Communications Act does not expressly withhold such auctioning authority.[5] As AirTouch points out, the courts have repeatedly stated that the Commission may not levy charges or fees absent separate and explicit statutory authorization from Congress to do so.[6] The Commission cannot create in itself the power to adopt a pricing mechanism for number resources merely because it finds such a system an "efficient" means of administration pursuant to Section 251(e).

The Joint Commenters also agree with AT&T and MCI WorldCom that a pricing system would also arguably conflict with the Communications Act's requirement that numbering administration arrangements shall be competitively neutral between carriers. If a pricing mechanism applied only to newly-issued numbers – as opposed to numbers that had already been assigned – such a system would impact new entrants disproportionately, since they would be the entities ordering the greatest amount of new number resources. Small and rural carriers may also be disproportionately affected by a

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4 See AT&T Comments at 62.

5 See id. at note 132 (citing Railway Labor Executives' Assoc. v. NMB, 29 F.3d 655, 671 (D.C. Cir. 1994)(en banc), cert denied, 115 S. Ct. 1392 (1995)(administrative power cannot be inferred from the fact it is not expressly negated in the authorizing statute).

6 Id. at 25 (citing NCTA v. United States, 415 U.S. 336 (1974); Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135 (D.C. Cir. 1976), NAB v. FCC, 554 F.2d 1094 (D.C. Cir. 1976).

pricing mechanism, regardless of whether there was number pooling, since they may have fewer available cash resources. The Joint Commenters believe the impact of a pricing mechanism on such carriers is a serious issue, and urge the Commission to fully address these and similar issues of competitive neutrality.

II. The Commission Has Not Addressed Whether a Pricing Mechanism Will Be Necessary

In its initial Notice of Proposed Rulemaking ("Notice") in this proceeding, the Commission proposed considering pricing options as "an alternative approach" for improving number allocation, and stated that pricing "could be used in isolation or in combination" with other conservation methods.[7] Despite this statement of purpose, the Commission has not yet examined the manner or conditions in which a pricing mechanism would be useful, whether a pricing mechanism is necessary, or how such a system would work in combination with the Commission's existing conservation measures. These basic issues must be resolved.

It is not enough to determine that a pricing mechanism might produce "efficient" industry practices in isolation, as the Commission does in the FNPRM. Since a pricing mechanism would likely operate in tandem with other conservation measures, it is unlikely that a pricing mechanism would be needed[8] if the number pooling, mandatory utilization

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[7] See In the Matter of Number Resource Optimization, Notice of Proposed Rulemaking, CC Docket No. 99-200, FCC 99-122 (rel. June 2, 1999) at ¶ 225.

[8] Accord, Comments of Time Warner Telecom Holdings Inc. d/b/a Time Warner Telecom at 23.

reporting, audits and reclamation procedures established in the FNPRM work as intended.[9] And, if a pricing mechanism is truly intended as an "alternative" to other conservation measures, the Joint Commenters note that the Commission has not performed any consideration of the conditions under which this "alternative" would be used, or the effects this would have on the numbering system as a whole.

If the Commission determines that a pricing mechanism would improve the industry's efficiency after such an analysis, the Joint Commenters believe that the next step would be a cost-benefit analysis, to determine when a pricing mechanism could be justified in terms of its burdens on carriers and on competition. If a pricing mechanism's benefits are superfluous, or are not found to substantially outweigh its costs, then it should be abandoned. In such a balance of considerations, the Commission should always favor the welfare of competition and competitive carriers over an unproven measure whose costs may outweigh its benefits.

III. The Commission Has Not Adequately Addressed Significant Criticisms of a Pricing Mechanism In the Record

While a federal agency is not obligated to respond to every comment raised in a rulemaking, it is required to respond in a reasoned manner to the relevant and significant comments it receives and explain how the agency resolved any significant problems raised

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[9] Indeed, the Joint Commenters strongly suspect that number pooling – the very policy which the Commission believes will relieve any anticompetitive effects of a pricing mechanism – will make a pricing mechanism largely pointless, since it will presumably make it impossible for carriers to retain unneeded numbers, or maintain any wasteful practices.

in the comments while reaching its ultimate decision.[10] It is also firmly established that administrative agencies must give reasoned consideration to all the material facts and issues presented to them, and must articulate the basis for their decision with reasonable clarity.[11] In making a considered evaluation of the issues presented, the agency may not merely recite its conclusions or artificially narrow its options.[12] An agency decision which ignores vital comments regarding relevant issues, or which fails to provide an adequate rebuttal to those comments, may fail the Administrative Procedure Act's requirements.[13]

As the FNPRM indicates, many of the parties to this rulemaking have raised serious legal problems and policy issues regarding the Commission's inquiry into establishing a pricing mechanism for number resources.[14] By its own words, however, the FNPRM addresses just "one of the primary economic [criticisms]" of the pricing mechanism. Worse, the FNPRM then disposes of this criticism in an analysis consisting of just two sentences.[15] The rationale the FNPRM offers for this cryptic conclusion is that thousands-

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[10] See Rodway v. U.S. Dep't of Agriculture, 514 F. 2d 809, 817 ((D.C. Cir. 1975), citing Greater Boston Television Corp. v. FCC, 444 F.2d 841 (1970), cert. denied, 403 U.S. 923 (1971); see also Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 468 (D.C. Cir. 1998) ("[A]n agency must also demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant.")

[11] See P.A.M. News Corp. v. Hardin, 440 F.2d 255, 258 (D.C. Cir. 1971).

[12] See K.G.J. Pillai v. Civil Aeronautics Board, 485 F.2d 1018, 1027 (D.C. Cir. 1973).

[13] See Alabama Power Co. v. Costle, 636 F.2d 323, 384-85 (D.C. Cir. 1979) and PPG Industries, Inc. v. Costle, 630 F.2d 462, 467 (6th Cir. 1980).

[14] Indeed, the record does not appear to contain any comments supporting a pricing mechanism.

[15] See FNPRM at ¶ 251.

block number pooling will "substantially reduce the quantity of numbering resources new entrants will need to accumulate to enter the market."[16] On this basis, the FNPRM then resolves that "we continue to believe that a market-based approach is the most pro-competitive, least intrusive way of ensuring that numbering resources are efficiently allocated," and "[requests] further comment on how a market-based allocation system could be implemented."[17]

This limited analysis is not legally sufficient, nor does it justify moving the pricing proposal forward toward implementation. As discussed above, the Commission is obligated to address significant issues and criticisms raised in the record, and must explain the basis for its decision. The Commission cannot address a single criticism of its pricing proposal, claim that it will be resolved by an untested conservation measure, and then ratify its "belief" that a pricing mechanism would be "efficient" and "pro-competitive" without addressing the entire series of contrary arguments which remain. Rather, to withstand judicial scrutiny under the APA's "arbitrary and capricious" standard of review, the Commission must address the serious policy issues and legal questions that have been raised. This review is essential before the Commission further investigates the "efficiencies" of a pricing mechanism or otherwise considers the ways in such a system might be implemented.

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16 Id.

17 Id.

While the FNPRM briefly examines whether thousand-block number pooling might ameliorate some of the competitive concerns associated with a pricing mechanism,[18] it does not address the full range of potential problems raised in the record. These remaining issues must be squarely and seriously addressed by the Commission, not evaded.

For example, the Joint Commenters agree with Omnipoint Communications, Inc. ("Omnipoint"), AT&T Corp. (AT&T"), The Association for Local Telecommunications Services ("ALTS") and the Ad Hoc Telecommunications Users Committee that it would be extremely difficult to design a pricing mechanism that will operate in a competitively neutral manner.[19] Any pricing mechanism for numbering resources would particularly disadvantage smaller, less capitalized carriers which seek to enter new markets, since purchasing or bidding for telephone numbers would add uncertainty to the process of initiating service in new markets and would require them to expend scarce capital obtaining numbering blocks.[20] Indeed, the Commission reached much the same conclusions in the Notice.[21] As discussed above, however, the FNPRM does not address this issue.

IV. The Pricing Proposals Depart from the Commission's Own Precedent

As AirTouch, AT&T and NEXTLINK Communications, Inc. ("NEXTLINK") indicate in their comments, establishing a pricing mechanism would depart from the

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18 See FNPRM at ¶ 251.

19 See Omnipoint Comments at 31-33; AT&T Comments at 61-63; ALTS Comments at 27-28; and the Ad Hoc Telecommunications Users Committee Comments at 20.

20 See Omnipoint Comments at 31; ALTS Comments at 27.

21 See FNPRM at ¶ 230.

Commission's past rulings that no carrier or end user may hold a proprietary interest in number resources.[22] The Commission has repeatedly concluded that number resources are a "public resource" instead of property that can be bought or sold, and that carriers merely administer number resources for the efficient operation of the public switched telephone network rather than owning them.[23] Establishing a pricing mechanism where carriers would pay for access to number resources, or bid for them in some form of auction, would arguably give carriers the expectation of a degree of ownership, license or control over the number resources for which they have paid.[24] This would clearly mark a significant change in the Commission's numbering policies. As such, the Joint Commenters believe that such a policy departure must be fully explained and justified.

Moreover, if the Commission were to determine that a pricing mechanism does not create such ownership interests, the Joint Commenters believe that such a finding would beg further legal questions regarding the rights of carriers to retain a license or other proprietary expectation in the numbers they obtain through such a system.

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[22] See AirTouch Comments at 24-26; AT&T Comments at 63; NEXTLINK Comments at 21-22.

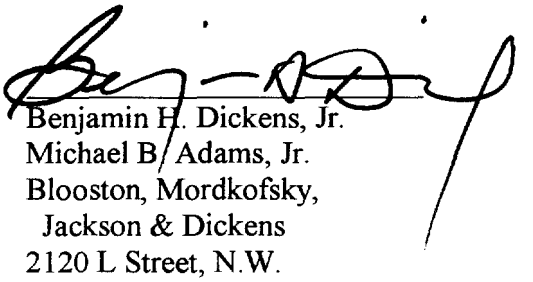
[23] See NEXTLINK Comments at 22, citing Administration of the North American Numbering Plan, Report and Order, 11 FCC Rcd 2588 (1995) and Toll Free Service Access Codes, Second Report and Order, 12 FCC Rcd 11162 (1997). In addition to Commission precedent, as AirTouch points out, the CO Code Guidelines currently state that, "[T]he NANP resources are considered a public resource and are not owned by the assignees. Consequently, the resources cannot be sold, brokered, bartered, or leased by the assignee for a fee or other consideration. See AirTouch Comments at 25, citing CO Code Guidelines at § 2.1.

[24] As AT&T further indicates, if a carrier was stripped of its numbers for its failure to pay, this would directly impact customers. See AT&T Comments at note 130.

V. Conclusion

For the foregoing reasons, as well as the substantial evidence which has already been entered in the record for this proceeding, the Joint Commenters strongly encourage the Commission to reexamine its conclusions concerning the establishment of a pricing mechanism for number resources. This must be done before the Commission takes any further steps towards implementing such a system.

Respectfully submitted,



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May 19, 2000

CERTIFICATE OF SERVICE

I, Michael B. Adams, Jr., hereby certify that I am an attorney with the law firm of Blooston, Mordkofsky, Jackson & Dickens and that a copy of the foregoing **"Joint Comments of Midvale Telephone Exchange, Inc., Northeast Louisiana Telephone Company, Inc., Interstate Telecommunications Cooperative, Inc. and Radio Paging Service"** was served this 19th day of May, by messenger to the persons listed below.

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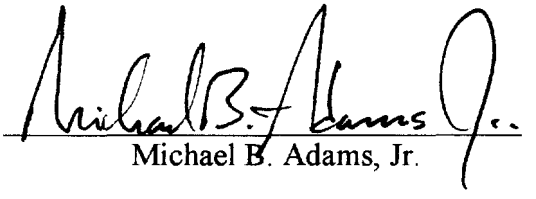

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